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Public Prosecutor v Aszroy bin Achoi

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HIGH COURT (KOTA KINABALU) — CRIMINAL CASE NO BKI-45SO-9/12 OF 2016
RAVINTHRAN J
26 MARCH 2018

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Criminal Law — Security offences — Terrorism — Images extracted from accused's mobile phone associated with Islamic State — Accused person provided password to Facebook account which had postings promoting Islamic State and terrorism — Whether accused's defence probable — Whether raised reasonable doubt on prosecution's case — Penal Code ss 130J(1)(a) & 130JB(1)(a)

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Upon receiving information that the accused was involved in security offences, the police raided the accused's house but found no one. The accused surrendered himself at the police station and was arrested by police officer PW3. PW3 brought the accused to his house and made a search. A mobile phone was recovered and handed to the computer forensics investigator. 72 images were extracted from the mobile phone and according to an academic researcher, 43 out of the 72 images were associated with terrorist group, Islamic State ('IS'). The accused also provided the police with a password to a Facebook account and the postings on this Facebook accounted showed that they supported the IS and promoted terrorism as well. The accused was charged with two charges of terrorism under ss 130J(1)(a) and 130JB(1)(a) of the Penal Code. Satisfied that the prosecution had established a prima facie case, the accused was called to enter his defence. According to the accused: (a) he only knew about the IS through news and he did not agree with their ideology; (b) he did not have exclusive use of the mobile phone as the same was used by his friends and cousins; and (c) he was not the owner of the Facebook account and not responsible for the postings on it. The issue that arose was whether the accused's defence raised reasonable doubt.

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Held, convicting the accused for both charges:

(1) The accused made a bare denial that he had no knowledge of the Facebook account. There were six pieces of strong circumstantial evidence to link him to the Facebook account and his mobile number was used to register the same. The account could be reset with the same mobile number. Moreover, the password that the accused provided to the police could be used to access the Facebook account. The cumulative effect of the circumstantial evidence was that it led to the irresistible conclusion that the accused was the owner of the Facebook account. The

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prosecution could successfully rely on s 114A of the Evidence Act 1950 that provides a rebuttable presumption that the accused was the publisher of the incriminatory postings (see paras 80 & 82–83).

(2) The accused did not say, in his confessionary statements, that his friends and cousins had used this mobile phone. His mother never told the police when handing over the phone that it had also been used by her son's friends and cousins. The defence sprung for the first time at the defence stage and was very likely a fabrication (see para 87).

(3) The defence of the accused was only one of bare denial which was not sufficient to cast a doubt on the prosecution's case. In light of the accused's bare denial, the prosecution has proved its case beyond reasonable doubt on both charges. The accused was found guilty of both charges and convicted for the same. After considering the accused's mitigation, he was sentenced to seven years imprisonment for the first charge and two years imprisonment for the second charge. Both sentences were ordered to run concurrently (see paras 88, 91, 97 & 105).

[Bahasa Malaysia summary

Setelah menerima maklumat bahawa tertuduh terlibat dalam kesalahan keselamatan negara, pihak polis menyerbu rumah tertuduh tetapi tidak menemui siapa-siapa. Tertuduh menyerah diri di balai polis dan ditangkap oleh pegawai polis PW3. PW3 membawa tertuduh ke rumahnya dan membuat carian. Sebuah telefon bimbit dirampas dan diserahkan kepada penyiasat forensik komputer. 72 imej diekstrak dari telefon bimbit dan menurut penyelidik akademik, 43 daripada 72 imej ini berkaitan dengan kumpulan pengganas, Islamic State ('IS'). Tertuduh juga memberitahu polis kata laluan bagi akaun Facebook dan terbitan dalam akaun Facebook menunjukkan bahawa mereka menyokong IS dan juga mempromosi keganasan. Tertuduh didakwa dengan dua pertuduhan keganasan bawah ss 130J(1)(a) dan 130JB(1)(a) Kanun Keseksaan. Berpuas hati bahawa pihak pendakwaan telah menubuhkan kes prima facie, tertuduh dipanggil membela diri. Menurut tertuduh: (a) dia hanya mengetahui tentang IS melalui berita dan dia tidak setuju dengan ideologi mereka; (b) dia tidak mempunyai penggunaan eksklusif telefon bimbit tersebut kerana ia digunakan oleh kawan-kawan dan sepupunya; dan (c) dia bukan pemilik akaun Facebook dan tidak bertanggungjawab bagi terbitan dalamnya. Isu yang timbul adalah sama ada pembelaan tertuduh menimbulkan keraguan munasabah.

Diputuskan, mensabitkan tertuduh bagi kedua-dua pertuduhan:

(1) Tertuduh membuat penafian semata-mata bahawa dia tidak tahu tentang akaun Facebook tersebut. Terdapat enam keterangan ikut keadaan yang kuat untuk mengaitkannya dengan akaun Facebook dan nombor telefon bimbitnya digunakan untuk mendaftar akaun Facebook ini. Akaun

tersebut boleh diset semula dengan nombor telefon bimbit yang sama. Tambahan lagi, kata laluan yang tertuduh berikan kepada polis boleh digunakan untuk mengakses akaun Facebook tersebut. Kesan kumulatif daripada keterangan ikut keadaan ini adalah bahawa ia membawa kepada kesimpulan yang tidak dapat disangkal bahawa tertuduh adalah pemilik akaun Facebook tersebut. Pihak pendakwaan boleh merujuk pada s 114A Akta Keterangan 1950 yang memperuntukkan anggapan bahawa pihak tertuduh adalah penerbit terbitan-terbitan salah tersebut (lihat perenggan 80 & 82–83).

(2) Tertuduh tidak mengatakan, dalam pernyataan pengakuannya, bahawa rakan-rakan dan sepupunya telah menggunakan telefon bimbit tersebut. Ibunya juga tidak pernah memberitahu polis tentang ini, ketika menyerahkan telefon tersebut, bahawa ia digunakan oleh rakan-rakan dan sepupu anaknya. Pembelaan ini timbul buat pertama kalinya di peringkat pertahanan dan berkemungkinan direka (lihat perenggan 87).

(3) Pembelaan tertuduh hanyalah satu penafian yang tidak cukup untuk menimbulkan keraguan terhadap kes pendakwaan. Berdasarkan penafian semata-mata ini oleh tertuduh, pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah terhadap kedua-dua pertuduhan. Tertuduh didapati bersalah atas kedua-dua pertuduhan dan disabitkan atas kesalahan. Setelah menimbangkan penafian tertuduh, dia dijatuhkan hukuman tujuh tahun penjara untuk pertuduhan pertama dan dua tahun penjara untuk pertuduhan kedua. Kedua-dua hukuman diperintahkan berjalan serentak (lihat perenggan 88, 91, 97 & 105).]

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Bakhshish Singh v State of Punjab AIR 1971 SC 2016, SC (refd)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Chandrasekaran & Ors v PP [1971] 1 MLJ 153 (refd)
DA Duncan v PP [1980] 2 MLJ 195, FC (refd)
Leong Wing Kong v PP [1994] 2 SLR 54, CA (refd)
Loo Ting Meng v v PP [2014] 6 MLJ 208, FC (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Md Zainudin bin Raujan v PP [2013] 3 MLJ 773; [2013] 4 CLJ 21, FC (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561; [1994] 4 CLJ 2086, SC (refd)
PP v Mohamed Ali [1962] 1 MLJ 257 (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
Pendakwa Raya v Jusninawati bt Abdul Ghani [2016] MLJU 1256, HC (folld)
Pendakwa Raya lwn Siti Noor Aishah bt Atam [2017] 7 MLJ 461, HC (folld)
Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
Criminal Procedure Code ss 180(4), 182A
Evidence Act [SG] s 47
Evidence Act 1950 ss 45, 45(1), 114A, 114A(1)
Penal Code ss 130B, 130J(1), (1)(a), (2), (2)(k), 130JB(1)(a), (2), Chapter VIA
Security Offences (Special Measures) Act 2012 ss 17, 18, 18A, Part VII

Jamadi bin Salleh (Farah bt Abdul Razak with him) (Adnan Puteh & Saleh) for the accused.
Muhammad Fadzlan bin Mohd Noor (Noor Syazwani bt Mohamad Sobry with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Ravinthran J:

[1] The accused was charged with two terrorism related cases. The trial was conducted under the Security Offences (Special Measures) Act 2012 (Act 747).

[2] The charges read as follows:

First charge (amended)

Bahawa kamu pada 5 Julai 2016 hingga 19 Julai 2016, di Kampung Kota Bungan, Jalan Kudat, dalam daerah Kota Belud, dalam negeri Sabah, dengan pengetahuan telah memberi sokongan kepada kumpulan pengganas Islamic State dengan cara menggunakan aplikasi media social, Facebook atas nama Yohyo Illa'nun AlSaba Malizia milik kamu, dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah perenggan 130J(1)(a) Kanun Keseksaan yang boleh dihukum di bawah peruntukan yang sama.

Second charge (amended)

Bahawa kamu pada 24 Julai 2016 jam lebih kurang 10 pagi, di Bilik Cawangan Khas, Ibu Pejabat Polis Daerah Kota Belud, dalam daerah Kota Belud, dalam negeri Sabah, telah memiliki 43 keping imej yang mempunyai kaitan dengan kumpulan pengganas Islamic State (IS) di dalam sebuah telefon berwarna hitam jenama Samsung model: SM- G318HZ/DS (IMEI 1: 352465/07/594418/0; IMEI2:352466/07/594418/8) dan dengan itu kamu telah melakukan satu kesalahan di bawah perenggan 130JB(1)(a) Kanun Keseksaan [Akta 574] dan boleh dihukum di bawah peruntukan yang sama.

CASE FOR THE PROSECUTION

[3] The prosecution called a total of 11 witnesses to prove its case. The summary of the evidence of the witnesses for the prosecution is as follows.

[4] PW1 (DSP Sufian bin Ali of Counter Terrorism Unit of the Federal Police Headquarters) received information on 27 June 2016 that the accused was involved in committing security offences. PW2 (ASP Alizan bin Hj Dalaman of the Sabah Police Headquarters) led a raiding party on 19 July 2016 to the village of the accused in Kota Belud but did not find anyone in the house. On 21 July 2016, the accused surrendered himself at the Kota Belud Police Station and was promptly arrested by PW3 (Inspector Mohd Hainal bin Zainal of Kota Belud Police Station).

[5] PW3 brought the accused to his house and made a search. He seized some items including books, a 'Sony Erikson' handphone and a pen drive. However, these items did not incriminate the accused and are not subject matter of the two charges. According to PW7 (the mother of the accused) who testified for the prosecution, the 'Sony Erikson' handphone that the police took from her house belonged to her nephew. However, on 24 July 2016, PW7 found a 'Samsung' handphone in the room of the accused and handed it over to the police.

[6] PW8 (Inspector Nur Zahirah bt Mustapha) who is a computer forensics investigator extracted 72 images from the 'Samsung' handphone for further analysis. She was unable to extract anything from the 'Sony Erikson' handphone as it was damaged. PW10 (Professor Rohan Kumar Gunaratna) who is an academic researcher on terrorist groups including the terrorist group that calls itself *Islamic State* analysed the said images. He said that 43 of the 72 images are associated with *Islamic State*.

[7] Upon arrest, the accused provided the police with a password to a Facebook account by the name of 'Yohyo Illa'nun AlSaba Malizia'. Professor Rohan analysed the postings on this Facebook account and concluded that they support the terrorist group known as *Islamic State* and promote terrorism as well.

[8] PW6 (Hairul Anuar bin Mat Nor) who is a director at the Network Surveillance Department of the Malaysian Communications and Multimedia Commission (MCMC) gave evidence to link the mobile number of the accused to the 'Yohyo Illa'nun AlSaba Malizia' Facebook account.

[9] PW5 (Muhammad Taufiq bin Mohd Zaki of Celcom Axiata Sdn Bhd) gave evidence of the status of two mobile phone numbers. He said mobile No 013-5409158 was registered under the name of Aszroy bin Achoi (the accused) since 11 November 2015 whereas mobile No 014-5599144 was registered under the name of Siti Animah. He said prior to 11 November 2015, two other customers' names appear as registered users for the mobile No 013-5409158. He said, the account with the mobile No 013-5409158 was

rendered inactive on 27 September 2016 whereas mobile No 014-5599144 was active at the time of printout. The postings in relation to the charges were made at the time the accused was the registered user of the mobile No 013-5409158.

WHETHER PRIMA FACIE CASE ESTABLISED?

[10] A prima facie case is established when the prosecution successfully tenders credible evidence to prove each ingredient of the offence which if unrebutted or unexplained would warrant a conviction (s 180(4) of the Criminal Procedure Code). In the case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, the Federal Court cited *Mozley and Whiteley's Law Dictionary* (11th Ed) which defined 'prima facie case' as follows:

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

[11] The duty of the court at the end of the case of the prosecution as explained by the Federal Court is as follows:

> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

[12] In the premises, the court is bound to carry out a maximum evaluation of the evidence of the prosecution and must be prepared to convict the accused on the two charges in question if he remained silent in the event he is called to enter his defence. With the above directions in mind, I shall now consider the elements that the prosecution must prove to establish a prima facie case.

FIRST CHARGE

[13] The first charge is under s 130J(1)(a) of the Penal Code. The offence creating provision reads as follows:

> 130J Soliciting or giving support to terrorist groups or for the commission of terrorist acts
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> (1) Whoever knowingly and in any manner solicits support for, or gives support to —

(a) any terrorist group; or

(b) the commission of a terrorist act,

shall be punished with imprisonment for life or imprisonment for a term not exceeding thirty years, or with fine, and shall also be liable to forfeiture of any property used or intended to be used in connection with the commission of the offence.

[14] Thus, the essence of the offence under s 130J(1)(a) would be knowledge on the part of the accused in respect of support given to a terrorist group. In the premises, having regard to the first charge, the prosecution must prove the following elements:

(a) that the accused was the owner of the Facebook account in question;

(b) that he knowingly made the postings in question;

(c) that the postings come within the ambit of 'support' under s 130J(2)(k); and

(d) that the 'support' was given to a terrorist group;

WHETHER ACCUSED OWNER OF FACEBOOK ACCOUNT 'YOHYO'?

[15] This is the crucial element to link the accused to the offence in question, ie giving support to a terrorist group via a Facebook account. In my opinion, the prosecution has tendered credible evidence to prove that the accused is the owner of the Facebook account by the name of 'Yohyo Illa'nun AlSaba Malizia'.

[16] PW6 gave crucial evidence to link the said Facebook account to the accused. He works at the Malaysian Communications and Multimedia Commission ('MCMC') which is the government regulator of the country's communications and multimedia industry. He is the director of the Network Surveillance Department at the MCMC. He is a qualified computer professional with master's degree in information security and bachelor's degree in Computer Science. His job includes monitoring network security and addressing virus and malware issues.

[17] The investigating officer of the case, ie PW11 (Insp Safwan) requested him to ascertain the ownership of two Facebook accounts. The information supplied was two Facebook account names, passwords and the two mobile numbers. PW6 used open sources on the internet to compare with the information given to him by the investigating officer. He prepared a report. His findings are as follows. He could not verify the owner of the Facebook account 'AL Bornezy' as the account was inactive and he could not use the password

provided to him by the investigating officer. However, he found that the Facebook account 'Yohyo Illa'nun AlSaba Malizia' was active and he was able to use the password supplied by PW11. It must be recalled that the accused himself gave the password to the police after he was arrested. PW6 used the account reset simulation method to find a link between the mobile numbers given to him and the said Facebook account of 'Yohyo Illa'nun AlSaba Malizia'. He surfed to the Facebook website and pressed the reset account button with the mobile No 013-5409158 and Facebook displayed the Facebook account in question, ie 'Yohyo Illa'nun AlSaba Malizia'. He said that it means that the said mobile number was used to register the said Facebook account.

[18] The investigating officer sent the said mobile number to the telecommunications company in question ie Celcom Axiata Sdn Bhd for registration details and activity status. The relevant officer from the telecommunications provider, ie PW5 was called to testify. I had summarised his evidence earlier. To recapitulate, he said that the mobile No 013-5409158 was active and that it was registered in the name of the accused person.

[19] Another crucial piece of evidence that PW6 revealed in court is as follows. On the Facebook page of 'Yohyo Illa'nun AlSaba Malizia' (at p 8 of the report) a photograph had been uploaded with another mobile number, ie 019-8039610 written on it with the following note:

> dalam gambar itu adalah akaun saya yang pertama dengan post penulisan saya.

Upon checking with the same telecommunications company, PW6 discovered that the mobile No 019-8039610 was also registered in the name of the accused. PW5 from Celcom Axiata Sdn Bhd confirmed that fact as well. PW6 also noted that the photographs posted on the 'Yohyo Illa'nun AlSaba Malizia' Facebook page bore resemblance to the photograph of the accused that was furnished by the National Registration Department ('NRD'). I have looked at the Identity Card photograph of the accused issued by the NRD and the photograph printed from the Facebook page of 'Yohyo Illa'nun AlSaba Malizia' with said mobile number. The two photographs certainly bear a striking resemblance.

[20] Another piece of evidence that connects the accused to 'Yohyo Illa'nun AlSaba Malizia' Facebook account is the nickname of 'Yohyo'. Although, the name of the accused is Aszroy, his mother (PW7) testified that his family nickname is 'Yohyo'.

[21] Finally, it is essential to note that the accused had voluntarily furnished the password to the 'Yohyo Illa'nun AlSaba Malizia' Facebook account and the 'Al Borneozy' Facebook account to the investigating officer. The username he gave for the said accounts are the mobile Nos 013-5409158 and 019-8039610.

He also confessed in his statement after arrest (P52A) that he is the owner of the said Facebook account 'Yohyo Illa'nun AlSaba Malizia'. The Facebook account 'Yohyo Illa'nun AlSaba Malizia' could be accessed by using the password provided by the accused. This fact provides strong corroborative evidence that the accused is the owner of the said account and it lends credence to his confessionary statement made after arrest.

[22] The confessionary statement of the accused was admitted into court pursuant to s 18A of the SOSMA which reads as follows:

> 18A Statement by accused
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> Any statement by an accused whether orally or in writing to any person at any time shall be admissible in evidence.

[23] Counsel for accused objected to the statement on the ground that it is not admissible under the Criminal Procedure Code. I overruled the objection as the SOSMA is a special law that governs trials of security offences. In accordance with the basic principle of statutory interpretation captured in the Latin maxim *generalia specialibus non derogant* which means that the general provisions of the law must yield to special provisions of the law, I hold that s 18 overrides any impediment to the admission of the said statement that is found in the Criminal Procedure Code or the Evidence Act 1950. In fact, s 18 is found in Part VII of the SOSMA and s 17 enacts that Part VII shall have effect notwithstanding any inconsistency with the Evidence Act 1950.

[24] I find support for the view in the unreported cases of *Pendakwa Raya lwn Siti Noor Aishah bt Atam* [2017] 7 MLJ 461 and *Pendakwa Raya v Jusninawati bt Abdul Ghani* [2016] MLJU 1256 that was brought to my attention by the learned DPP. In the said cases, the court held that a confessionary statement of an accused person can be admitted under s 18A without regard to the provisions of the Criminal Procedure Code and the Evidence Act 1950.

[25] Thus, in summary, the prosecution had tendered the following pieces of evidence to connect the accused to the 'Yohyo Illa'nun AlSaba Malizia' Facebook account:

(a) the mobile number belonging to the accused was used to register the 'Yohyo Illa'nun AlSaba Malizia' Facebook account because it can be used to reset the Facebook account;

(b) his previous mobile number appears in a photograph on 'Yohyo Illa'nun AlSaba Malizia' Facebook page;

(c) his picture with the said mobile number is posted on the Facebook page;

(d) his mother told the court that his family nickname is 'Yohyo';

(e) the accused supplied the password and mobile numbers in question to the investigating officer and the Facebook account 'Yohyo Illa'nun AlSaba Malizia' could be accessed using the said password; and

(f) the accused admitted being the owner of the 'Yohyo Illa'nun AlSaba Malizia' Facebook account in his statement to the police.

[26] During cross-examination, counsel for accused did not manage to challenge the evidence of PW6 that the phone number of the accused was used to register the 'Yohyo Illa'nun AlSaba Malizia' Facebook account. He only made suggestions that a fake account could have been created or that the account could have been hacked. Counsel for accused however managed to elicit an answer from PW6 to the effect that a Facebook user need not link his mobile number to his account. However, it must be noted that in this case, PW6 said that the said handphone was actually linked to the Facebook account by the accused as PW6 was able to reset the Facebook account with the said mobile number. In the premises, the irresistible inference that can be drawn is that the mobile number of the accused is linked to the 'Yohyo Illa'nun AlSaba Malizia' Facebook account.

[27] Based on the abundant circumstantial evidence that links the accused to the 'Yohyo Illa'nun AlSaba Malizia' Facebook account, I find that the accused is its owner.

WHETHER ACCUSED KNOWINGLY MADE THE POSTINGS IN QUESTION?

[28] In respect of the above element, the prosecution relied on the rebuttable statutory presumption provided by s 114A of the Evidence Act 1950 which appears to focus on internet publications. It reads as follows:

114A Presumption of fact in publication

(1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.

(2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.

(3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.

(4) For the purpose of this section —

(a) 'network service' and 'network service provider' have the meaning assigned to them in section 6 of the Communications and Multimedia Act 1998 [Act 588]; and

(b) 'publication' means a statement or a representation, whether in written, printed, pictorial, film, graphical, acoustic or other form displayed on the screen of a computer.

[29] In the instant case, the prosecution has tendered strong and credible circumstantial evidence to prove that the accused is the owner of the 'Yohyo Illa'nun AlSaba Malizia' Facebook account. In the premises, under sub-s (1) of s 114A, the accused must be presumed to be the publisher of the contents of the said Facebook page.

[30] During cross-examination of the prosecution of the witnesses, counsel for accused did not manage to elicit any evidence to rebut the said presumption. In the premises, at this stage it must be deemed that the accused had knowingly made the postings in support of the terrorist group known as *Islamic State* on the Facebook page in question.

SUPPORT

[31] The newly created offences under Chapter VIA (Offences Relating to Terrorism) of the Penal Code appears to have been broadly defined to combat the threat posed by international terrorist organisations such as the *Islamic State* which uses the internet to recruit and radicalise members. Of relevance to this case is limb (k) of s 130J(2). It reads as follows:

130J (2) For the purposes of subsection (1), 'support' includes —

(a)–(j)

(k) using social media or any other means to —

(i) advocate for or to promote a terrorist group, support for a terrorist group or the commission of a terrorist act; or

(ii) further or facilitate the activities of a terrorist group.

[32] In the premises, postings on social media in a Facebook account that advocate for or promote a terrorist group would be sufficient to constitute 'support' under s 130J(1)(a) although no physical or material support on the ground is actually extended.

EXPERT OPINION EVIDENCE

[33] The prosecution called Professor Rohan Kumar Gunaratna to give expert opinion evidence on the nature of the Facebook postings on the Yohyo account. The calling of Professor Rohan was objected by counsel for accused person. Counsel for accused argued that the Facebook postings and images referred to in the two charges do not require expert opinion as they can be interpreted by a layman and therefore do not fall under s 45(1) of the Evidence Act 1950. He said that expert opinion evidence must be in the field of scientific study. The prosecution replied that the expert witness is called only to furnish the court with information that is outside the knowledge and experience of the court which in this case is the field of terrorism studies. I overruled the objection of counsel for accused. Section 45(1) of the Evidence Act 1950 does not state that only persons with scientific skill can be called to tender opinion evidence. It mentions 'science or art'. Section 45, shorn of illustrations, reads as follows:

> 45 Opinions of experts
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> (1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.
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> (2) Such persons are called experts.

[34] In the case of *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153, Raja Azlan Shah J (as HRH then was) said that the expression 'science' or 'art' is elastic enough to be given a liberal interpretation. His Lordship noted that although there is no mention of handwriting, footprint or telephony in s 45, evidence of experts on these subjects had been held as admissible. In the Singapore case of *Leong Wing Kong v Public Prosecutor* [1994] 2 SLR 54, Yong Hung Pow CJ said that it is difficult to categorise the practice of drug users and suppliers as either science or art. However, His Lordship in considering s 47 of the Evidence Act of Singapore (equivalent to our s 45) said as follows:

> As far as is material to the present case, s 47 provides for the admission of expert evidence if the evidence covers an area of 'science or art'. The scope of the term has been widely construed and is not restricted to the subjects of pure science and art. *Stephen's Digest* (art 49) states that the words should 'include all subjects on which a course of special study or experience is necessary to the formation of an opinion'. The court has a discretion to decide whether an issue is one of science or art and consequently whether expert evidence is admissible.

[35] I overruled the objection of counsel for accused to the calling of an expert witnesses to testify. As stated in the authorities stated above, 'science or

art' in s 45 need not be confined to pure science or pure art. A liberal interpretation may be given in the exercise of the discretion of the court. In the instant case, subject matter in question is postings on Facebook that allegedly promote terrorist ideology. Although, it is possible that a layman may be able to read the obvious postings and determine whether they constitute 'support' for terrorist groups, I am of the opinion that the opinion of an academic who had devoted himself to the study of the online activities of terrorism sympathisers and their ilk is relevant and may assist the court. In any event, it is trite law that expert opinion is not binding on the court. Thus, if an expert on this subject expresses an opinion that does not commend itself to either party, they are at liberty to urge the court to reject it.

QUALIFICATION OF EXPERT

[36] Professor Rohan Kumar Gunaratna is a Professor of Security Studies at the S Rajaratnam School of International Studies in the Nanyang Technological University in Singapore. He has a master's degree in International Peace Studies University of Notre Dame in the United States and a doctorate in International Relations from the University of St Andrews in the United Kingdom. He is also the Head of the International Centre for Political Violence and Terrorism Research. He said that security study is the specialist study of international relations and strategic studies as it pertains to the security of nations.

[37] In his court testimony, Professor Rohan said that a Facebook page used for terrorism purpose can be best recognised by an expert in terrorism studies. He said that terrorism study is a sub-field of security studies. Professor Rohan has written numerous articles on the study of terrorism in international journals and has published 20 books on the subject. He has also given evidence in the courts of United States, Bosnia and Malaysia. He gave evidence in some Malaysian cases where accused persons were charged under Chapter IVA of the Penal Code. He said that his opinion was accepted by the courts. Having regard to his qualifications as security studies specialist who had done in depth research on the subject of terrorism and international terrorist groups, I was satisfied that Professor Rohan is an expert on the subject. I am also of the view that the submission of counsel for accused that the opinion of Professor Rohan could be inaccurate or biased is without merit. Professor Rohan was not challenged during cross-examination in respect of his integrity as a bona fide and widely acclaimed and published academic on terrorism studies. Professor Rohan told the court that he has no interest in the case at hand. In fact, it is his first visit to Sabah. Therefore, the suggestion that he could be biased is totally baseless. I am also of the view that the suggestion that Professor Rohan's opinion is inaccurate merely because he does not know the Malay language is misplaced. Professor Rohan explained that everything in the 26

A postings in the Malay language were translated to him by his assistant who is a Malay and researcher in the field of counter-terrorism.

NATURE OF POSTINGS

B **[38]** The Facebook account in question in the first charge is the Facebook account by the name of 'Yohyo Illa'nun AlSaba Malizia'. The investigating officer of the case (PW11) printed 26 postings from the said Facebook account and forwarded them to Professor Rohan (PW10) for analysis. Professor Rohan told the court that the postings in Malay were translated to him by his assistant, C one Nur Halim who is fluent in the language. After analysing the postings, he prepared an expert report which was tendered in evidence.

[39] Professor Rohan concluded that nine Facebook postings are IS linked, D eight postings are extremist in nature, five postings show support for the Irranun community that the accused belongs to, and four postings are irrelevant. He said the postings on *Islamic State* shows his support for the terrorist group and it contains extremist ideology. He concluded as follows:

E Q: What are your conclusion about Aszroy Bin Achoi based on the postings made in the facebook account yohyo illanun Al-saba' malizi?

A: Firstly, Aszroy Bin Achoi is a passionate researcher about the Iranun community. Second, he is a supporter and a sympathizer of IS. Third, he has been radicalized by being exposed to IS ideology and F propaganda.

[40] Professor Rohan opined that while his postings on the Iranun community of which he is a member of may amount to research, in respect of G his postings on the *Islamic State*, he was a passionate supporter. The accused openly expressed his affiliation to the *Islamic State* by stating that 'I will be a lion for the Daulah' in which 'Daulah' is a reference to the *Islamic State*. He also said that from the postings on the account of Yohyo, the account owner knew that his online activities had attracted the interest of the police and that they H were looking for him. For this reason, he was willing to be 'martyred'.

[41] The opinion of Professor Rohan that the postings on the 'Yohyo Illa'nun AlSaba Malizia' Facebook account expresses support for the *Islamic* I *State* must be given considerable weight. I would opine that even without the opinion evidence of Professor Rohan, the court is in a position to conclude from the plain language used by the accused to applaud and identify with the cause of the *Islamic State* that the prosecution has proven the element of 'support' within the meaning of s 130J(2) of the Penal Code.

TERRORIST GROUP

[42] In s 130B which applies to offences under Chapter IVA of the Penal Code, 'terrorist group' is defined as follows:

> 'terrorist group'
>
> means —
>
> (a) an entity that has as one of its activities and purposes the committing of, or the facilitation of the commission of, a terrorist act; or
>
> (b) a specified entity under section 66B or section 66C of the Anti-Money Laundering Act 2001;

'Terrorist act' is defined very broadly under s 130B as well. In addition, Professor Rohan testified that the *Islamic State* is an international terrorist group that has made use of religion for its own purposes and has indulged in violence. However, even without the evidence of Professor Rohan, it must be deemed that the *Islamic State* is a terrorist group with the meaning of s 130B because it has been *gazetted* as one under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001.

[43] For all the above reasons, I am satisfied that the prosecution has established a prima facie case by adducing beyond reasonable doubt evidence in respect of the essential elements of the offence of under s 130J(1)(a) of the Penal Code.

SECOND CHARGE

[44] The second charge is under s 130JB(1)(a). It reads as follows:

> 130JB Possession, etc of items associated with terrorist groups or terrorist acts
>
> (1) Whoever —
>
> (a) has possession, custody or control of; or
>
> (b) provides, displays, distributes or sells,
>
> any item associated with any terrorist group or the commission of a terrorist act shall be punished with imprisonment for a term not exceeding seven years, or with fine, and shall also be liable to forfeiture of any such item.

[45] In sub-s (2), 'item' is defined as follows:

> 'item' includes publications, visual recordings, flags, banners, emblems, insignia and any other thing displaying symbols associated with a terrorist group, terrorist act or ideology of a terrorist group;
>
> 'publications' includes all written, pictorial or printed matter, and everything of a nature similar to written or printed matter, whether or not containing any visible representation, or by its form, shape or in any other manner capable of suggesting

A words or ideas, or an audio recording and every copy, translation and reproduction or substantial translation or reproduction in part or in whole thereof.

B **[46]** The essential elements of this offence would be that the accused was in possession of items associated with a terrorist group which in this case is the *Islamic State*. The items in question are 43 images that were recovered from a Samsung model handphone that allegedly belonged to the accused.

C **[47]** I would also hold that given the wide definition of 'publications' which includes 'everything of a nature similar to written or printed matter', digital images would also come within the meaning of 'publication' and consequently within the meaning of 'item'.

POSSESSION

D

[48] The accused was arrested on 21 July 2016. The police brought him to his house to search for evidence but did not recover the handphone in question. However, on 24 July 2016, the mother of the accused (PW7) brought a 'Samsung' handphone to the police station in Kota Belud and handed it over to E PW11. She said that she found the handphone in the room of the accused when she was checking his clothes.

F **[49]** The accused admitted in his statement (P52A) after arrest that the handphone belonged to him. He also admitted that he had downloaded and saved several images associated with the terrorist organisation known as *Islamic State*. For reasons given earlier, I ruled that the statement is admissible under s 18A of the SOSMA.

G **[50]** The investigating officer (PW11) could not access the handphone because the accused gave a wrong password. The accused told him that he changed the password a few times and could not remember. PW8 who is a police computer forensics investigator accessed the hard drive of the handphone using specialised software (XRY equipment) and downloaded its H contents into a compact disc. She discovered that the handphone had been used to log in to the Facebook account in question ie 'Yohyo Illa'nun AlSaba Malizia'.

I **[51]** Although PW8 did not have the Facebook ID of the accused, she said that his handphone was displayed as the Facebook ID. Her evidence is as follows:

Q: Rujuk kepada CD di bahagian summary device/accounts. Boleh kamu jelaskan paparan yang ada itu?

A: Merujuk kepada device iaitu account dalam telefon bimbit Samsung ini iaitu terdapat Android password daripada barang kes iaitu passwordnya Yohyo. Akaun yang digunakan adalah Facebook. Nama yang digunakan iaitu AkhiYo Iranun SamahBorneo. Gmail yang digunakan di dalam barang kes merujuk kepada device iaitu ID: Yohyoirranuni@gmail.com.

Yang pertama, AkhiYo Iranun SamahBorneo menggunakan telefon nombor +60128197561 dan facebook ID seperti yang tertera.

Yang kedua iaitu Yohyo Illa'nun AlSaba Malizia telefon bimbit +60135409158 dan facebook ID tersebut seperti yang dipapar juga.

[52] As it is established that the mobile number is that of the accused, her evidence provides corroborative evidence that handphone belonged to him as well. In summary, the prosecution has furnished the following pieces of evidence to prove that handphone belonged to the accused person and that he was in possession of it prior to his arrest:

(a) his mother found it among his clothes;

(b) he admitted in P52A that it belonged to him; and

(c) the police forensics officer found that his mobile number was used to access the Facebook account 'Yohyo Illa'nun AlSaba Malizia'.

ISSUES RAISED BY DEFENCE

[53] Counsel for accused suggested that the accused did not have exclusive use of the handphone as during cross-examination, the mother of the accused said that the handphone was used as a family phone. However, the prosecution established that only the accused and his parents lived in the house. His siblings did not live in the house. His mother (PW7) told the court she only knew how to receive and make phone calls. In the premises, it is highly unlikely that any other person could have used the phone to download the images associated with the *Islamic State* and access the 'Yohyo Illa'nun AlSaba Malizia' Facebook account. Furthermore, analysis by PW8 did not reveal any evidence of use of the handphone by other members of the family in the form of text messages.

[54] Counsel for accused suggested that there was a break in the chain of evidence pertaining to the 'Samsung' handphone when it was sent to MCMC. I see no merit in this submission. The investigating officer (PW11) clearly stated in his evidence that initially he sent the handphone to MCMC but they could not analyse the phone because of the wrong password that was given by the accused. He then sent the phone to PW8 who works in the Police Computer Forensics Laboratory at Cheras. He also said affirmatively that he sent the images to Professor Rohan for analysis. In the absence of contradictory evidence, PW11 must be presumed to be a disinterested and neutral public officer in the service of law enforcement. Therefore, I see no reason to doubt his

credibility (see *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257).

[55] Counsel for accused also put to PW8 that the images in question could have come from the history folder of the handphone because of surfing by the users. However, PW8 emphatically stated that the images in question were downloaded and not automatically stored in the history folder of the handphone. Again, in the absence of expert rebuttal evidence, I see no reason to doubt her evidence.

[56] Thus, although the evidence of possession is largely circumstantial apart from the admission of the accused in P52A, I am satisfied that it is conclusive and that it excludes any hypothesis consistent with the innocence of the accused (see *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579).

[57] Finally, it must be said that in the absence of expert rebuttal evidence at this stage, I have no reason to doubt the expertise and credibility of the evidence of PW8. Although she is a police officer, she is a specialist attached to the Police Forensics Laboratory at Cheras. She has attended numerous courses in computer forensics in Malaysia, Thailand, Australia and the United States. She has analysed over 500 cases and had given evidence in the Malaysian courts at all levels. Therefore, I see no reason not to accept her evidence.

[58] In the premises, for the above reasons, I am satisfied that the prosecution had tendered credible evidence to prove the element of possession on the part of the accused person in respect of the handphone in question.

ITEMS ASSOCIATED WITH TERRORIST GROUP

[59] PW8 told the court that using special software, she extracted over 5,000 images from the 'Samsung' handphone. She spent five days going through the said images with the investigating officer (PW11). She selected 72 images which appeared to be related to terrorism. The images were given to Professor Rohan (PW10) for analysis and expert opinion.

[60] I have already given reasons to accept Professor Rohan as an expert witness due to his extensive academic research into the terrorist group known as the *Islamic State* and some other terrorist groups. In the premises, I also had no reason to reject Professor Rohan's analysis on the images recovered from the handphone of the accused.

[61] Professor Rohan said that the 72 images fell into five categories but he said that 38 images were linked to the terrorist group known as the *Islamic State*, two images are linked to South East Asian members of the *Islamic State*

and three images are that of *Islamic State* linked with weapons. Thus, he concluded that 43 images are items associated with a terrorist group, ie the *Islamic State*.

[62] Professor Rohan said as follows:

> Q: Can you explain in detail about the 43 images that linked to IS?
>
> A: *43 out of 72 are IS linked. Amongst others they bear the IS symbols and flag, the examples are seen in image 1 and 2. When not associated to IS, the symbols are not extremist and read 'Lailalailah' which means there is no God but Allah and Muhammadun Rasullah which means Muhammad is the messenger of Allah. Out the 43 images, two include the presence of South East Asian militants in Syria and Iraq. Image 3 shows Malaysian IS militant who died in a battle in Iraq. He is known online as Abu Syami. His photo is complemented with quotes which are also seen in other online accounts of terrorist and their supporters online. The quotes implied that IS in Syria and Iraq, the group which Abu Syamir is in, comprises those who are righteous. 'Go to the Levant as Allah has chosen to be the place where His righteous servants would gather.' Image 4 shows an Indonesian IS leader in either Syria or Irag. He is known online and in IS videos as Abu Muhamad Al Indonesi.*

[63] Professor Rohan concluded as follow in respect of the images given to him:

> The 72 images were found in Aszroy bin Achoi's forensic report, they are provided as images without any context. There is also no information given on whether the images had been disseminated by Aszroy bin Achoi or whether he had received them from others. At first glance, this missing links caused the images to appear ambigous. However, even with the missing links, the striking observation is that Aszroy bin Achoi is a strong follower and supporter of militancy and the terrorist group notably IS cannot be ruled out. All except six images are terrorist and extremist in nature. If Aszroy bin Achoi had shared the materials, it shows his intentions to spread that terrorist messages in the materials. If he had obtained them from others, it signifies his affiliations, linkages and networks with the others in the extremist community.

[64] I have also perused the 43 images in question which blatantly depicts weapons and Islamic State symbols. Quite obviously, even without the benefit of expert opinion evidence, the prosecution would be able to persuade the court to rule that the said images are those associated with the terrorist group known as the *Islamic State*.

[65] In conclusion, I find that the prosecution has established a prima facie case under the second charge as well. I therefore called the accused to enter his defence on both charges.

DEFENCE

[66] The accused gave sworn evidence in his defence. He was the sole witness. His testimony was fairly brief. In summary, it is as follows.

[67] He is 26 years old. At the time of his arrest, he lived in a village in Kota Belud. He studied up to Form Five only. He failed in the Sijil Pelajaran Menengah (SPM) examinations. Since then, he had been doing temporary jobs in Sabah and in Kuala Lumpur. His last occupation was as 'pemetik buah kelapa' (coconut picker) in his village. He lived in his parents' home. His older siblings lived elsewhere. As he is on the move doing odd jobs, sometimes he spent nights in his grandmother's house in Kg Merabau.

[68] One day, when he returned to his mother's house, he heard that the police had come looking for him. On the advice of his mother, he turned himself in at the Kota Belud Police Station and was promptly arrested.

[69] In relation to his alleged support for the *Islamic State,* his defence is one of denial. He said that he only knows about the *Islamic State* through watching news on television networks. He viewed them as extremists, terrorists and radicals. To a question by his own counsel whether he agreed with their ideology, he said no. He reasoned that they are inhuman and deviant. He also said that he did not do any research on *Islamic State* through the internet.

[70] When the accused was shown his confessionary statements in P52A and P52B in which he admitted posting messages applauding *Islamic State* on the 'Yohyo Illa'nun AlSaba Malizia' Facebook account, he said that he signed the statements because he could not withstand the pressure of being interrogated by the police and that he was tired.

[71] During cross-examination, he agreed that his mother had her own telephone. He agreed that his parents did not know how to use all the features of the Samsung handphone in question. He also agreed that his mother did not even know how to make a call by pressing the buttons. He said as follows:

Q: Setuju jika katakan bapa dan mama kamu hanya tahu mendial telefon?

A: Mendial tidak, cuma cakap saja.

Q: Saya katakan kepada kamu hanya kamu seorang yang sebenarnya tahu mengunakan kesemua fungsi telefon bimbit samsung tersebut?

Q: Setuju.

[72] However, when it was put to him that therefore the images in the handphone had been put there with his knowledge, he said that his friends had also used his handphone. When he was further cross-examined whether he had knowledge about the images insides the Samsung phone, he was not sure.

[73] However, the accused proceeded to name five of his alleged friend who had used his handphone. He also said that his handphone was used by his cousins. He named four of them. However, he agreed that they did not use the handphone every day.

[74] The accused also agreed that the mobile telephone number that was used on the 'Samsung' handphone was registered under his name.

[75] In respect of use of the social media platform called Facebook, he denied knowledge of the 'Yohyo Illa'nun AlSaba Malizia' account. He said that he is not the owner of the said Facebook account and that he was not responsible for the postings on it. However, he agreed that the profile picture used on the 'Yohyo Illa'nun AlSaba Malizia' page is his photograph. He also agreed that his photograph is also on p 10 of the printout of the Facebook page that was tendered in evidence. However, the accused denied being the owner of the 'Yohyo Illa'nun AlSaba Malizia' Facebook and said that he had his own Facebook account under the name of 'Azroy Semtasi'.

DUTY OF COURT AT END OF DEFENCE CASE

[76] Under s 182A of the Criminal Procedure Code, at the end of the case for the defence, it is the duty of the court to consider all the evidence adduced before it and consider whether the prosecution has proved its case beyond reasonable doubt. In *Md Zainudin bin Raujan v Public Prosecutor* [2013] 3 MLJ 773; [2013] 4 CLJ 21, the court said as follows:

> At the conclusion of the trial, s 182A of the Criminal Procedure Code imposes a duty on the trial court to consider all the evidence adduced before it and to decide whether the prosecution has proved its case beyond reasonable doubt. The defence of the accused must be considered in the totality of the evidence adduced by the prosecution, as well as in the light of the well established principles enunciated in *Mat v PP* [1963] 1 MLJ 263; [1963] 1 LNS 82 with regard to the approach to be taken in evaluating the evidence of the defence.

[77] Thus, in accordance with the principle laid down in *Mat v Public Prosecutor* [1963] 1 MLJ 263 that was echoed in the latter case of *Public Prosecutorv Saimin & Ors* [1971] 2 MLJ 16, the falsity of the defence does not relieve the prosecution from proving its case beyond reasonable doubt. Even if I disbelieve evidence tendered by the accused, I must still consider whether it raises a reasonable doubt on the whole of the prosecution's case.

A WHETHER REASONABLE DOUBT RAISED?

[78] The defence of the accused in this case is simply one of denial in respect of the accusation under both charges.

B

[79] In respect of the charge under s 130J(1)(a), ie expressing support for the *Islamic State* on the Facebook account under the name of 'Yohyo Illa'nun AlSaba Malizia', he simply denied any knowledge of it. He denied being the owner of the account and denied expressing support for the *Islamic State*.

C

[80] In my opinion, the accused had made a bare denial that he has no knowledge of the 'Yohyo Illa'nun AlSaba Malizia' Facebook account. The prosecution had tendered six pieces of strong circumstantial evidence to link him to the Facebook account in question. I have listed them in para 25 above. The accused's mobile number was used to register the Facebook account and the account could be reset with the same mobile number. Moreover, it is telling that the password that the accused provided to the police can be used to access the 'Yohyo Illa'nun AlSaba Malizia' Facebook account. In the premises, even if the story of the accused that he was pressured by the police to sign a confession in exhs P52A and P52B is not ruled out, the other pieces of circumstantial evidence are sufficient to conclude that the accused is the owner of the account in question. Although, there is no burden on the accused to disprove the case for the prosecution, he has given no explanation why his handphone is linked to the account in question and why he knew the password to the said account. All that he said in his defence was that he had no knowledge of the 'Yohyo Illa'nun AlSaba Malizia' account and that he disapproves of the terrorist group known as the *Islamic State*.

D

E

F

[81] The accused also told the court that he had his own Facebook account by the name of 'Azroy Semtasi' when he denied knowledge of the 'Yohyo Illa'nun AlSaba Malizia' Facebook account. However, this fact was never raised during the case for the prosecution. In any event, it is not relevant as I take judicial notice that one person can register more than one account on a social media platform such as Facebook.

G

H

[82] In my view, the cumulative effect of the circumstantial evidence is that it leads to the irresistible conclusion that the accused is the owner of the 'Yohyo Illa'nun AlSaba Malizia' Facebook account and the evidence excludes any other hypothesis (see *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195 and *Bakhshish Singh v State of Punjab* AIR 1971 SC 2016).

I

[83] As I said earlier in para 28, in view of the strong circumstantial evidence linking the accused to the 'Yohyo Illa'nun AlSaba Malizia' Facebook account, the prosecution can successfully rely on s 114A of the Evidence Act 1950 that

provides a rebuttable presumption that the accused is the publisher of the incriminatory postings in question. In my opinion, the bare denial of the accused denying any link to the said Facebook in the face of formidable circumstantial evidence cannot rebut the said statutory presumption.

[84] In respect of the second charge of possessing images associated with the *Islamic State* in the Samsung handphone, the accused generally denied knowledge of possession. However, it must be noted that he prevaricated and actually strengthened the case of the prosecution. At one point of the cross-examination, he said as follows when asked if knew about the digital photographs inside the 'Samsung' handphone:

Q: Saya katakan kepada kamu gambar-gambar yang berkaitan dengan IS yang terdapat dalam telefon bimbit tersebut adalah dalam pengetahuan kamu. Setuju atau tidak?

A: Tidak pasti.

[85] He told the court that his mother also used his handphone. However, he also agreed to the suggestion that his mother had her own handphone. Finally, he agreed that the mobile number used in the 'Samsung' handphone was registered in his name.

[86] The mainstay of his defence in respect of possession was that it was not exclusive. He said that his phone was sometimes used by frends and sometimes by his cousins who visited him in his house. He was able to name most of them but he did not call a single one as his witness.

[87] I should think that the argument of the prosecution that this defence should be viewed suspiciously on the ground that it could be a recent invention has considerable merit. During the entire case for the prosecution, the defence that 'Samsung' handphone had also been used by friends and cousins of the accused was never put to any of the prosecution witnesses including the investigating officer. The accused also did not say in his confessionary statements in exhs P52A and P52B that his friends and cousins had used this handphone. The mother of the accused never told the police when handing over the phone that it had also been used by her son's friends and cousins. This is a crucial defence as it is in respect of the element of exclusivity of possession. However, it was sprung for the first time at the defence stage. In the premises, the defence of the accused that the handphone had been used by so many others is very likely a fabrication (see *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; [1994] 4 CLJ 2086 and *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209). It is also not probable that in this day and age, one handphone would had been shared or used by almost a dozen adults as the accused would have the court believe.

DECISION AT CLOSE OF DEFENCE CASE

[88] Thus, the defence of accused was only one of bare denial which will not be sufficient to cast a doubt on the case for the prosecution (see *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195 and the more recent Federal Court case of *Loo Ting Meng v v Public Prosecutor* [2014] 6 MLJ 208).

[89] Although I disbelieved the accused and I noted the failure of the accused to rebut the presumption in s 114A of the Evidence Act 1950, I must still proceed to ask if the defence had raised a reasonable doubt on the whole of the prosecution's case for the reason that there is no duty on an accused person in a criminal trial to prove anything.

[90] 'Reasonable doubt' in criminal law is not any sort of doubt that is imaginary or even fanciful. An off-quoted definition on reasonable doubt was given in the case of *Public Prosecutor v Saimin & Ors* by Sharma J which is as follows:

> It has again been said that 'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there'. Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

[91] As I said earlier, the prosecution has tendered strong circumstantial evidence to prove that the accused is the owner of the Facebook account in question and that the handphone in question was in the possession of the accused before his arrest. In the face of this evidence, the accused had made a bare denial only. Therefore, in whatever manner the evidence is viewed, in the light of the accused's bare denial, I find that the prosecution has proved its case beyond reasonable doubt on both charges. I therefore find him guilty upon both charges and I convict him of the same.

SENTENCE

[92] The maximum punishment for the offence stated in the first charge is life imprisonment or 30 years imprisonment with fine. In respect of the offence stated in the second charge, the maximum punishment is seven years imprisonment.

[93] Counsel for accused canvassed the following factors to mitigate punishment. In summary, they are as follows. He highlighted the economic and educational background of the accused. The accused was only educated up to Form Five. He failed his SPM examinations and worked as a 'pemetik buah kelapa'. He loved doing research on the history of the Irranun community to which he belongs. He loved sharing information on the social media platform particularly Facebook.

[94] He also decided to do research on the *Islamic State* because it was always in the news. As the accused is naïve and gullible and given his limited education, he was misled by what he read. However, his support for *Islamic State* was limited to online postings only. He did not take up or intend to take up arms to support the *Islamic State*. The accused also shared information including images with his friends without realizing the sensitivity of the material. He only had 20 friends on his social media platform.

[95] After citing the general principles of sentencing, counsel for accused submitted that the accused has no previous convictions, that he is remorseful and that lengthy imprisonment would not be in the public interest.

[96] The learned DPP argued that a deterrent sentence is called for in this case given the heavy punishment prescribed by the law. He also urged the court to consider that the accused had claimed trial in this case. He said that being a first offender is not necessarily a mitigating factor for a serious crime. He urged the court to consider the public interest as the actions of the accused person had potential to influence others to support the terrorist group known as the *Islamic State*.

[97] I am mindful that the accused had committed a serious offence although he did not actually take up arms or provide material support for a terrorist organisation. As I said earlier, the maximum punishment under the first charge is life imprisonment or 30 years imprisonment and the maximum punishment under the second charge is seven years imprisonment.

[98] Nonetheless, on the first charge, I imposed seven years imprisonment and on the second charge I imposed two years imprisonment. I ordered both sentences to run concurrently from date of arrest. My reasons are as follows.

[99] In the instant case, as submitted by counsel for the accused, although the maximum punishment for the offences in question is heavy, the accused had not committed any violent act, or provided material assistance to a terrorist group or had even planned to carry out a terrorist act. The background to the prescription of the heavy punishments for offences relating to terrorism must be considered.

A **[100]** The offences in question were recently created by Parliament to meet the threat posed by international terrorist organisations such as the *Islamic State*. The offences criminalise a wide range of behaviour including violent and non-violent acts relating to terrorism. For instance, an online 'like' or other form of applauding on a social media platform in respect of the commission of a terrorist act would constitute the offence giving 'support' to a terrorist group. The maximum punishment is life or 30 years imprisonment. However, it must be noted that actual preparatory acts to go overseas and join a terrorist group and carry out terrorist acts also carry the same maximum punishment.

C **[101]** In the premises, a lengthy term of imprisonment that is based solely on the maximum punishment may amount to a crushing sentence if the facts of a particular case do not justify it. All this means that the court should carefully consider the background facts of the offence and not merely look at the maximum punishment and consider whether a heavy sentence is appropriate.

[102] In the instant case, although the accused had been responsible for the postings that constitute support for the *Islamic State*, it is clear that there was no indication whatever that he planned to provide material support to the terrorist group or take part in terrorist acts. There is no denying that what he did is wrong and that he deserves the punishment of immediate incarceration. Nonetheless, I am of the view that a lengthy imprisonment is not appropriate for the above reason.

F **[103]** I am also of the view that lengthy imprisonment is not a suitable punishment for another reason. One of the important aims of the modern criminal justice system is rehabilitation of the prisoner so that he may be able to return to society as a reformed person and not be a burden to the state. It is likely that the terrorist group known as the *Islamic State* had abused and misused religion to recruit supporters as stated by Professor Rohan. To my mind, counsel for accused was probably right when he submitted that the naïve accused from the interior district of Sabah had been misled given his low education and poor background.

H **[104]** In my other terrorism cases involving the *Islamic State*, the prosecution had informed the court that the prisons department has a well-structured counselling programme to aid prisoners who had been influenced by the *Islamic State* in their reformation. In my opinion, a lengthy spell of incarceration may impede the rehabilitative process. Furthermore, as the 26-year-old accused had not committed any violent act, the door should be open for him to return to society without spending the best years of his life in prison.

[105] The learned DPP had urged the court to impose consecutive sentences for both charges. The court has a discretion to impose concurrent sentences if the offences are related or if the imposition of the consecutive sentences would be disproportionate to the crime. In the instant case, the possession of digital images associated with the *Islamic State* in the handphone is related to the first charge. Furthermore, as I said earlier, a lengthy incarceration would not assist in achieving the rehabilitative aim of sentencing. In the premises, I ordered the sentences to run concurrently.

Accused convicted for both charges.

Reported by Afiq Mohamad Noor